

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUBEN MENDOZA)	
Claimant)	
VS.)	
)	
MONFORT, INC.)	Docket No. 208,602
Respondent)	
Self-Insured)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Pamela J. Fuller on October 15, 1998. The Appeals Board heard oral argument May 5, 1999.

APPEARANCES

Michael Snider of Wichita, Kansas, appeared on behalf of claimant. Terry J. Malone of Dodge City, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge denied claimant's request for work disability after finding that claimant was terminated for cause from his employment with respondent. Instead, the ALJ awarded benefits for a 10 percent disability based on functional impairment. On appeal, claimant contends he is entitled to a work disability award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. The Board agrees that the award must be limited to functional impairment but concludes that the impairment is higher than that found by the ALJ and awards benefits for a 20 percent disability.

Findings of Fact

1. Claimant injured his low back on April 1, 1994, while stacking hides weighing approximately 150 pounds in the course of his duties for respondent.
2. Claimant received treatment from Dr. Pedro A. Murati from April 11, 1994, through May 2, 1994. Dr. Murati diagnosed lumbosacral strain, treated with physical therapy, and released claimant to return to work on May 2, 1994, with no permanent restrictions.
3. Claimant returned to work for respondent but switched to work trimming hides, a lighter type of work than stacking hides.
4. Respondent terminated claimant for cause effective June 29, 1995. The termination was for alleged sexual harassment of coworkers. The Board finds respondent had a good faith belief that claimant had engaged in improper conduct and the stated grounds for termination were not merely a pretext. This finding is based primarily on testimony of Ms. Diana Sinclair, assistant personnel director, who obtained statements from persons claiming to be the subject of the harassment.
5. Respondent has a policy of accommodating work restrictions imposed for work-related injuries.
6. After claimant left employment for respondent, he was examined and his injury was evaluated by several physicians, including Dr. Kris Lewonowski, Dr. P. Brent Koprivica, and Dr. C. Reiff Brown.
7. Dr. Lewonowski examined claimant at the request of respondent for complaints of low back pain with radiating leg pain. X-rays done as a part of that examination revealed severe degenerative changes in the lumbar spine and a CT scan showed degenerative change and spinal stenosis at L3-4 and L4-5. Dr. Lewonowski testified that the work activities did not cause the degenerative changes or spinal stenosis but did exacerbate the symptoms. He rated the impairment according to the 4th Edition of the AMA Guides as 10 percent of the whole body. He ordered a functional capacity evaluation which reflected that bending, stooping, climbing, and crouching should be no more than occasional. Claimant can frequently squat, crawl, and kneel. Dr. Lewonowski concluded claimant should alternate standing and sitting with sitting four hours per day for 45-minute periods and standing two to three hours per day for 25-minute periods. He concluded claimant can walk three to four hours per day but again not all at once.
8. Dr. Koprivica also examined claimant. Dr. Koprivica reviewed a 1990 x-ray which showed lumbar spondylosis, 1994 x-rays indicating multilevel degenerative disc disease, a 1995 CT scan which revealed severe degenerative disease with lumbar spinal stenosis at L3-4 and L4-5, and an MRI done in 1996 which demonstrated disc desiccation at L1-2, L2-3, L3-4, L4-5, and a bulging disc from L2 to L5. Dr. Koprivica testified that the activity

of pulling and stacking hides would accelerate underlying disc disease and would aggravate and intensify the symptoms. He also testified that if claimant were to return to heavy work it would further accelerate and aggravate the underlying disc disease. He testified claimant would not be able to return to the job of stacking hides.

Dr. Koprivica rated the impairment, according to the 3rd Edition, Revised, of the AMA Guides, as 20 percent of the whole body.

Dr. Koprivica recommended claimant be limited to:

- a. Sedentary work.
- b. Occasional lifting/carrying up to 10 pounds.
- c. Sitting 45 minutes, no more than 4 hours of an 8-hour day.
- d. Walking 25 minutes, no more than 3 to 4 hours of an 8-hour day.
- e. No more than occasional bending, stooping, climbing, and crouching.
- f. No sustained awkward positions of the lumbar spine.

Dr. Koprivica reviewed a report prepared by Ms. Karen C. Terrill and concluded claimant had lost the ability to perform 83 percent of his work tasks.

9. Dr. Brown saw claimant at respondent's request on September 11, 1996. Dr. Brown reviewed the medical history and conducted an examination. Dr. Brown diagnosed degenerative problems involving the entire lumbar spine, existing for years, with spinal stenosis at at least two levels. Based on the history claimant gave, Dr. Brown assumed the injury rendered symptomatic his preexisting degenerative problems. Dr. Brown found no problem with radiculopathy but felt claimant needed injections of the sacroiliac and adjacent spinal ligaments as well as epidural injections. Dr. Brown treated claimant with those injections and then released claimant with a recommendation to Monfort on February 11, 1997, that claimant alternate sitting and standing and to work only 6 hours in an 8-hour day.

Dr. Brown rated claimant's impairment according to the AMA Guides, 3rd Edition, Revised, as 19 percent of the whole body.

Dr. Brown recommended permanent restrictions as follows:

- a. Avoid being on feet more than one hour at a time, alternating with equal period of sitting and walking.
- b. Occasional use of stairs, ladders, and ramps.
- c. No lifting more than 40 pounds occasionally, 20 pounds frequently, using proper body mechanics.
- d. No frequent bending of more than 20 to 30 degrees.

- e. Due to deconditioning, limit to shorter than normal workday at least at first return.

Dr. Brown testified that returning to work lifting 150-pound hides is outside claimant's work restrictions.

10. Ms. Terrill, vocational expert, prepared a list of tasks claimant had performed in the work he did during the 15 years before the accident. She applied Dr. Koprivica's restrictions to the list of tasks and concluded claimant cannot do 83 percent. As above indicated, Dr. Koprivica agreed with this assessment. Ms. Terrill also testified it was highly unlikely claimant would find any type of gainful employment.

Conclusions of Law

1. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

2. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

3. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

4. The Board agrees with and affirms the conclusion by the ALJ that claimant's award must be limited to the functional impairment. Claimant returned to work for respondent where he worked for approximately one year and was then terminated for cause. He would

be making the same wage had he not been terminated for cause and that wage must be imputed.

Claimant argues that the evidence does not prove claimant, in fact, sexually harassed his coworkers. Claimant denied that he did, and the only evidence presented to the contrary was hearsay evidence in the form of written statements presented to the personnel officer. But the Board does not interpret the Act to require that it retry the underlying issue to determine the truth or falsehood of the grounds asserted for the termination. Rather, the Board believes it is enough if the evidence establishes that the employer, in good faith, believed that cause existed and was not merely using that cause as a pretext for some other reason to justify the termination. In this case, the evidence indicates respondent had reason to believe and did believe claimant engaged in the misconduct of which he was accused. The Board finds that claimant would have continued to earn 90 percent or more of his preinjury wage but for that misconduct. The wage paid by respondent after the injury should be attributed to claimant even after the termination and the award, therefore, limited to disability based on functional impairment. K.S.A. 44-510e.

5. While the Board concludes the award should be limited to functional impairment, the Board also believes the evidence establishes functional impairment greater than the 10 percent awarded by the ALJ. Claimant has multilevel degenerative disc disease and spinal stenosis aggravated by the work injury necessitating severe restrictions. The Board concludes the ratings by Drs. Koprivica and Brown more accurately reflect the functional impairment.

6. Based primarily on the opinions of Drs. Koprivica and Brown, the Board concludes claimant is entitled benefits based on a 20 percent functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Pamela J. Fuller on October 15, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ruben Mendoza, and against the respondent, Monfort, Inc., a qualified self-insured, for an accidental injury which occurred April 1, 1994, and based upon an average weekly wage of \$422.84, for 53 weeks of temporary total disability compensation at the rate of \$281.91 per week or \$14,941.23, followed by 75.4 weeks at the rate of \$281.91 per week or \$21,256.01, for a 20% permanent partial disability, making a total award of \$36,197.24, all of which is presently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael Snider, Wichita, KS
Terry J. Malone, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director